BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACKIE LYNN SWATZELL	)	
Claimant	)	
	)	
VS.	)	
	)	
WHITES FOODLINER	)	
Respondent	)	Docket No. 1,005,633
	)	
AND	)	
	)	
NATIONWIDE MUTUAL INS. CO.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the April 16, 2003 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) determined claimant failed to sustain her burden of proof that her accidental injury arose out of and in the course of employment and she failed to provide notice within 10 days or establish just cause for enlargement of the notice period to 75 days.

Claimant argues she notified her supervisor that work was causing her back pain and that there is medical evidence to support her assertion she suffered a series of repetitive traumas to her back while lifting boxes of meat at work.

Respondent argues claimant never provided timely notice and the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and the parties briefs, the Board finds the ALJ's Order should be affirmed.

The claimant was employed as the meat market manager for respondent. Her job duties included lifting and carrying boxes of meat. Claimant testified she began to experience back pain beginning in November 2001. Claimant sought treatment with Mary Beth Van Roekel, A.R.N.P.[1], who performed diagnostic testing and ordered additional diagnostic tests. Claimant later had an office visit with Dr. David A. Benavides on January 14, 2002. She testified that her back pain progressively worsened as she continued working.

After claimant saw Dr. Benavides she testified that she told the store manager, Mr. Michael L. Corcoran, that her back problem was work-related. She stated Mr. Corcoran asked whether she would be filing for workers compensation but suggested that she should turn the claim in to her health insurance.

Mr. Corcoran, respondent's store manager, testified that claimant never told him she was having back problems. He further specifically denied claimant ever said her work activities were causing her back problems. Mr. Corcoran noted claimant had made a prior workers compensation claim and that as soon as she had reported that claim an accident form was prepared. Mr. Corcoran further noted that if claimant had told him that her work was causing her back problems, he would have prepared an accident form as he had done on her previous claim. Lastly, Mr. Corcoran denied he told claimant to handle her claim through her health insurance.

Claimant agreed that she was aware she needed to report work-related accidents. Claimant had a prior work-related head injury while working for respondent and had accident forms completed in order to receive medical treatment for that injury. She further agreed that she never sought nor requested medical treatment after her visit with Dr. Benavides on January 14, 2002. And she was aware that if she suffered a work-related injury she had the right to request medical treatment from her employer.

Mr. Corcoran testified claimant continued to perform her regular job duties from January 14, 2002, until she was terminated from employment on March 10, 2002. Mr. Corcoran described an incident where claimant had said she would be at work and failed to show up as scheduled. Mr. Corcoran then discovered where claimant was, he had a telephone conversation with her and he was told she would be right in to work. Claimant did not show up and also failed to show up at work the following day. Claimant was then terminated the next day. Mr. Corcoran was not aware claimant alleged a work-related injury until he received the letter from claimant's attorney in July 2002.

Claimant never sought any additional treatment after the January 14, 2002, office visit with Dr. Benavides until she saw Dr. Pedro A. Murati in December 2002. During that

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[1] Claimant referred to Mary Beth Van Roekel as a doctor but Dr. Benavides' January 14, 2002, office note refers to Beth Van Roekel as an Advanced Registered Nurse Practitioner.

interval claimant testified that her condition remained the same. She noted that approximately two months before the preliminary hearing she had returned to work for a different employer and her back condition had worsened.

The claimant is required to provide notice of a work-related accident to the respondent within 10 days or show just cause to extend the notice requirement to 75 days.[2] As noted, in this case, there is a major conflict between claimant's preliminary hearing testimony and the testimony of respondent's store manager. Thus, the Board finds the credibility of claimant is of utmost importance in deciding this case.

The Board finds the ALJ, in specifically finding claimant did not provide timely notice, had to conclude that claimant's testimony was not truthful. The ALJ had the opportunity to evaluate claimant's testimony because she testified in person at the preliminary hearing. In circumstances such as this, where there may be conflicting testimony, the Board finds it is appropriate to give some deference to the ALJ's conclusions as to credibility.

It is significant that on January 14, 2002, when claimant went to the doctor, she failed to mention that her symptoms stemmed from a work-related accident. It is equally significant claimant failed to seek treatment through March 10, 2002, when she was terminated from employment. And that she did not see a doctor until, at her attorney's request, she saw Dr. Murati on December 2, 2002. The Board also finds that claimant's testimony was contradicted by the testimony of respondent's store manager. The Board, therefore, concludes claimant failed to prove she provided respondent with timely notice of the accident.

The requirement to provide notice of accident within 10 days becomes somewhat confusing when dealing with microtrauma situations where accidents may occur over an extended period of time. It is undisputed claimant did notify respondent of an accident when her attorney sent respondent a letter in July 2002.

The Kansas Supreme Court, in *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999), reaffirmed the earlier findings in *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), that an appropriate date of accident to be utilized in microtrauma cases is the last day performing the offending activity, which in this case is the last day of work. While it is acknowledged *Treaster* dealt primarily with carpal tunnel syndrome, rather than a back condition as found here, it nevertheless applies to microtrauma injuries which occur over long periods of time, regardless of the body part involved.

In this case, it is undisputed claimant's last day worked was March 10, 2002. The letter from claimant's attorney to respondent was received by respondent in July 2002.

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[2] *See* K.S.A. 44-520.

Because the date of accident would be March 10, 2002, for the alleged series of accidents, this notice would be beyond the 10-day statutory notice requirement as well as the 75-day period. The July 2002 letter sent to respondent was beyond the 75-day limit and did not provide timely notice.

AWARD

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bruce E. Moore dated April 16, 2003, finding claimant failed to provide timely notice is affirmed.

IT IS SO ORDERED.

Dated this 30th day of May 2003.

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation